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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 691

RALPH NEILL, ET AL, *Appellants*

vs.

ROBERT J. COOK, ET AL, *Appellees*

Appeal From The Supreme Court of Texas

BRIEF OF APPELLANTS OPPOSING STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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NOW COME Appellants and file this, their Brief opposing the statement of Appellees opposing jurisdiction and opposing Appellees' Motion to dismiss the appeal or affirm the judgment appealed from and in support thereof, Appellants would respectfully show the Court the following

1.

AUTHORITIES CITED BY APPELLEES NOT PERSUASIVE

The Appellees have failed to show by their Brief that this Court lacks jurisdiction to hear this appeal. They have opposed Appellants' plea for relief on the ground that Appellants have not been deprived of due

process of law. In support of this proposition Appellees cite numerous inapposite cases, all of which are clearly distinguishable on the facts. Many of the cases cited by Appellees were decided under Article 2922a V.A.T.C.S. as it was phrased *prior* to amendments in 1947, 1927 and 1925. Some of the cases cited find support in Article 7 Section 3 of the Texas Constitution as it was written prior to its amendment in 1926.

Appellees place particular emphasis on the case of *Ivey v. Keeling*, 15 S.W. 2d 1097 (Texas Civil Appeals, 1929), appeal denied for lack of a substantial Federal question by United States Supreme Court, 281 U.S. 699, 50 S.Ct. 352, 74 L.Ed 1125 (1930), and its compainion predecessor case *Stinson v. Graham*, 286 S.W. 264 (Texas Civil Appeals, 1926, error refused) for support of their position in this case. Appellants question whether the due process question was squarely presented in either or both of these cases. In the Graham case the Court labored mainly to distinguish its case factually from the case of *Browning v. Hooper*, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330 (1925) rather than coming to grips with the due process question, if it was actually presented at all. Neither Ivey nor Graham indicates whether or not notice and/or hearing, or the lack of it, was a factor or was challenged in the case.

In the *Ivey v. Keeling* case the Court notes that the Court (the same Court of Civil Appeals) in the *Stinson v. Graham* case in effect held that there was no question presented for review because there had been no

election for the issuance of bonds and no special tax had been levied and the Court could not presume that such an election would be ordered and result favorably to an issuance of bonds. The Court notes that much of the Graham case was dictum and not necessary to a decision in that case. Nevertheless the Court in the Ivey case goes ahead and says that the dictum in the Graham case was proper to the Ivey case and holds that Articles 2922a to 2922l V.A.T.C.S. do not violate either the State or Federal Constitutions. The Court's opinion is insufficient to furnish a basis for determining whether that case is applicable to the instant case. In any event this Court must look to the facts in the instant case to determine if due process has been denied in violation of the Fourteenth Amendment to the Federal Constiution.

In the Ivey case there is more than one ground for decision, the Court noting that the attack on the acts of the County Board of School Trustees amounts to a collateral attack on their action and that the only proper mode of attacking such action would be by quo warranto and not by an ordinary lawsuit such as the one before the Court for review.

It should be noted that Article 2922a V.A.T.C.S. under attack in those cases as well as in the instant case has been amended at least once during the time since the *Ivey v. Keeling* case was decided. Although not discussed in the Ivey case or Graham case, Article 2922a prior to its amendment in 1947 required approval by Boards of Trustees of affected districts before their annexations to another district by a County

Board of School Trustees. After the 1947 amendment and as it reads now, Article 2922a has no requirement that approval be given by Trustees of affected districts prior to their annexation to another district. It is this deficiency, and orders passed pursuant thereto, without notice or opportunity for hearing, which Appellants allege have deprived them of their property without due process of law in this case.

The above considerations are pointed out so that this Court may see that the questions raised in this suit are not controlled by cases cited by Appellees. These cases do, however, demonstrate the callous disregard of basic individual rights denied to Appellants in this case and illustrate better than this brief or any other can suggest the disposition Texas Courts have shown in ignoring the unheeded cries of litigants for due process of law in this class of cases. In other areas Texas Courts have always resolved any issue involving the taking of property in favor of notice and opportunity for hearing. See *Francisco v. Board of Dental Examiners*, 149 S.W. 2d 619, (Texas Civil Appeals 1941, error refused), the Court noting that due process is generally conceded to include reasonable notice and the right to be heard. This is true whether the tribunal exercising jurisdiction over rights or privileges protected by the due process clause be a judicial, legislative, executive or administrative one. " 'The requirements of due process of law extend *to every case* of the exercise of governmental power.' 12 Am. Jur. 283, Section 586." (Emphasis added)

Appellants have sued in the instant case in their

individual capacities as citizens and taxpayers in addition to suing as members of the Boards of Trustees of the Districts in question. The question of the denial of private property rights without due process of law is squarely presented in this case. Some of the cases cited by Appellees, e.g. *Prosper Independent School District v. County School Trustees*, 58 S.W. 2d 5 (Texas Commission of Appeals, 1933), clearly indicate that the litigants in the case were there only in their capacity as public officials. Therefore, such a case has no application to the instant case in which the Appellants sue in their private as well as public capacities. The language of the Prosper Independent School District case finding that the School District in *its corporate capacity* has no vested right in its territorial boundaries has no application here.

In the case of *Love v. City of Dallas*, 40 S.W. 2d 20 (Texas Supreme Court, 1931), the Texas Supreme Court had occasion to discuss the relation between legislative power and school district or other municipal properties and recognized the following to be a correct statement of the law, citing from the case of *Pearson v. State*, 56 Ark. 148, 19 S.W. 499, 35 Am. St. Rep. 91, as follows:

> "The statement that counties and school districts are agencies of the state, and therefore subject to legislative control or annihilation, is a misleading generality. The corporate entity is a legislative creation, and its powers may be restrained, its functions changed, or its existence destroyed at the will of the legislature; but, in so far as it has acquired and holds property, it is but a trustee

> for the local public; and, although its powers be withdrawn or its existence ended, the property which survives it belongs to the same public, and must be, in some way, applied to its use. It has no contract right to exist as a corporation, but the public that it represents has a vested right in the municipal property acquired for its benefit, and is entitled to demand that such property be applied to its uses. 40 S. W. 2d 20, 27.

This case reviews a long line of decisions including *the Dartmouth College Case*, 4 Wheat. 518, 4 L.Ed. 629 (1819), which enunciated the principle that the power of the legislature over the property of corporations purely public was not absolute or unlimited.

2.

UNITED STATES SUPREME COURT NOT BOUND BY STATE COURT DECISION ON QUESTIONS ARISING UNDER FEDERAL CONSTITUTION

A judgment by the Texas Supreme Court that a Statute such as Article 2922a does not offend its own Texas Constitution does not bind the U. S. Supreme Court in its inquiry into whether the State Statute offends the Federal Constitution. This is a new and independent and non-delegable pursuit for the U. S. Supreme Court. It should be noted that in some of the cases cited by Appellees, the Constitutional questions presented were not due process questions, but were questions raising the issue of whether or not Article 2922a was a valid fulfillment of the Constitutional grant of power in Article 7, Section 3 of the Texas Constitution. See *McPhail v. Tax Collector of Van Zandt County*, 280 S.W.

260 (Texas Civil Appeals 1926, error refused); and *County School Board of Angelina County v. Homer Common School District*, 291 S.W. 268 (Texas Civil Appeals 1927, no writ history).

3.

POWER OF ADMINISTRATIVE AGENCY NOT THAT OF LEGISLATURE

The case of *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151, cited by Appellees at page 4 of their brief, involved an act of the Pennsylvania Legislature authorizing consolidation of certain cities under certain circumstances *after an election* was held on the question. In this case the vote in the election favored the consolidation. But because the Legislature can pass laws consolidating cities does not mean that an administrative body such as a County Board of School Trustees can combine or consolidate school districts. The Hunter case does not indicate any conspiracy on the part of governmental officials to conceal the proposed consolidation and does not outrage one's sense of justice as do the acts complained of in the instant case.

4.

VALIDATING ACTS NOT APPLICABLE

Article 2815g-57 V.A.T.C.S., the validating act cited by Appellees, is not applicable to this case. For one reason the instant case was still "pending" within the meaning of Texas law at the time the act became effective since the time for appeal to the United States

Supreme Court had not expired. See *Texas Company v. Charles Clark & Company*, 112 Tex. 74, 244 S.W. 995 (1922), which holds that the judgment of the Court of Civil Appeals did not become final so long as it was *subject* to review by the Supreme Court.

Section 4 of Article 2815g-57 V.A.T.C.S. making non applicable the provisions of the Act to litigation pending is not "the only exception" (page 6 of Appellees' brief) in the Act as Appellees would have this Court believe. The paragraph preceding Section 4 provides as follows:

> "Sec. 3. Anything to the contrary notwithstanding, this Act shall not be construed as validating any boundary change made or attempted to be made by any ex parte order, resolution or act of the board of trustees of any school district."

Appellants submit that this paragraph expressly governs the instant case, the orders appealed from being ex parte, affecting boundaries in all the districts involved, and made by a board of trustees of a school district which for this purpose is a county-wide school district.

Is Article 2815g-57 V.A.T.C.S. a valid exercise of legislative power? For all of its broad, sweeping terminology, in practical effect and application it is so limited in scope as to be but a species of special legislation dealing with the formation of school districts which violates Article Seven, Section Three of the Texas Constitution. This is a matter only the Texas Courts can determine under Appellees' theory of the

case, being a question arising as to a state statute violating a state constitution.

The question of the applicability of the validating act to the present controversy can not be determined initially by the Supreme Court of the United States. This act has not been found applicable or valid by the State court whose duty it would be to make these initial inquiries.

For the foregoing reasons Appellants submit that Article 2815g-57 V.A.T.C.S. by its own terms is inapplicable to the appeal in this case.

CONCLUSION

In no case cited by Appellees and in no case uncovered by Appellants' research has a court anywhere countenanced the complete disregard of fundamental rights and elements of due process as is manifest in the instant case. Because of the fact that only a small geographic area of rural West Texas is involved in this case, this Honorable Court may not feel inclined to take so small a matter under advisement. Appellants urge, however, that the rights asserted in this case by them are as large as the Constitution of the United States itself and as large as any this Court will have before it for consideration at this or any other term.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully pray that this Court find that this appeal presents substantial Federal questions requiring plenary consideration with briefs on the merits and oral argument for their resolution, and an ultimate

declaration from this Court that the orders complained of herein are void.

Respectfully submitted,

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PROOF OF SERVICE

I, Wayne A. Rohne, Attorney, of Counsel for Attorneys of Record for Ralph Neill et al, Appellants, depose and say that on the 5th day of February, 1964, I served a copy of the foregoing statement as to jurisdiction on Robert J. Cook, et al, Appellees herein, by depositing same in the United States mail box with first class postage prepaid addressed to Counsel of Record at their post office addresses as follows: Guilford L. Jones, P. O. Box 688, Big Spring, Texas; J. C. Hinsley, 630 Littlefield Building, Austin, Texas, Attorneys for Appellees.

Wayne A. Rohne

Wayne A. Rohne

SUBSCRIBED AND SWORN TO before me at Fort Worth, Texas, this 5th day of February, 1964.

Nell Mitchell

Notary Public in and for Tarrant County, Texas

My Commission expires June 1, 1965

NELL MITCHELL, Notary Public in and for Tarrant County, Texas